attributable to the client. The acts and omission of the attorney in such a case are those of the client: *Spaulding* v. *Thompson,* 12 Ind. 477, 74 Am. Dec. 221; *Smith* v. *Tunstead,* 56 Cal. 175; *Harper* v. *Mallory,* 4 Nev. 878; *Welch* v. *Challen,* 31 Kas. 696, 3 Pac. 314; *Clark* v. *Ewing,* 93 Ill, 572; *Scott* v. *Wright,* 50 Neb. 849, 70 N. W. 396; *Thomas* v. *Chambers,* 14 Mont. 423, 36 Pac. 814; *Merritt* v. *Putnam,* 7 Minn. 399; *Meyers* v. *Landrum,* 4 Wash. 762, 31 Pac. 33; *Matthis* v. *Cameron,* 62 Mo. 504; *State* v. *Elgin,* 11 Iowa, 216; *Dick* v. *Williams,* 87 Wis. 651, 58 N. W. 1029; *White* v. *White,* 169 Mass. 52; *Butler* v. *Morse,* 66 N. H. 429, 23 Atl. 90; *Bonnifield* v. *Thorp,* 71 Fed. 924; *Athens Leather Mfg. Co.* v. *Myers,* 98 Ga. 396, 25 S. E. 503; *Babcock* v. *Brown,* 25 Vt. 550, 60 Am. Dec. 290; BLACK, JUDGMENTS, § 341, FREEMAN, JUDGMENTS, § 112.

On the other hand, it is held in a few states that the negligence of the attorney is a sufficient ground for setting aside the judgment, provided the client himself was not directly in fault. Thus in *Taylor* v. *Pope,* 106 N. C. 267, 19 Am. St. Rep. 530, it was held that a judgment by default was properly set aside on the ground of excusable neglect, when such judgment was entered through the failure of counsel to enter a plea for defendant, after being employed and left in attendance upon the court. To the same effect, see, *Searle* v. *Christensen,* 5 S. Dak. 650, 60 N. W. 29; *Citizens National Bank* v. *Branden,* 19 N. Dak. 489, 27 L. R. A. (N. S.) 858, and note; *Meacham* v. *Dudley,* 6 Wend. (N. Y.) 514. And see, also, *Peterson* v. *Koch,* 110 Iowa, 19, 80 Am. St. Rep. 260, and note; *Manning* v. *Roanoke, etc., R. R. Co.,* 122 N. C. 824, 28 S. E. 963.

A very much wider discretion in divorce than in other cases was held permissible in California on the ground that the public has an interest in the result of every suit for divorce. "The policy and the letter of the law concur in guarding against collusion and fraud, and it should be the aim of the courts to afford the fullest possible hearing in such matters." *Wadsworth* v. *Wadsworth,* 81 Cal. 182, 22 Pac. 648, 15 Am. St. Rep. 38.

The interests of the individuals as well as of the community demand that there should be a definite end of every litigation; and nothing would be more impolitic than to leave it to the discretion of every court to revise and review and reconsider its judgment without limit. H. B. S.

STATE REGULATION OF FOREIGN CORPORATIONS AS AFFECTED BY THE INTERSTATE COMMERCE CLAUSE.—The decision of the Supreme Court of Michigan in *Lange Medical Company* v. *Brace,* 22 Detroit Legal News 535, 152 N. W. 1026, denied the right of a foreign corporation which had not complied with the state regulatory statute to sue its agent on a contract by which the agent was given the sale of its goods in a certain district within the state. The case presents the difficult problem of marking off the proper bounds of state and federal jurisdiction over matters that are in part interstate in scope and effect, in part intrastate.

The agent entered the employ of the corporation under a written contract giving him authority to sell goods and take orders in territory assigned to

him from time to time, subject to the instructions of the corporation as to terms and conditions and to its approval. He was (1) to devote his entire time to the business; (2) to remit the invoice price of all goods sold at the end of each week during the first year, and thereafter remit one-half the cash receipts each week until the account was settled in full, when he was to receive a 5% discount from the invoice price for all goods paid for within 30 days from date of sale; (3) to hold goods in trust, always subject to the corporation's order, free from any lien in favor of the agent; (4) to return all goods at the termination of the agreement, express or freight prepaid, and in good condition; (5) to furnish a suitable horse and wagon. The corporation was (1) to send all goods f. o. b. at prices named in the confidential price list furnished agents; (2) to supply the agent all the goods required and send them as needed, to the extent of 25% more than the bond; (3) to exchange all broken or soiled packages; (4) to credit the agent with all mail orders from his territory. A bond was given for the return of all property placed in the agent's hands and for payment to the corporation of the invoice value of any property not returned. The goods were charged to Brace on the corporation's books, and were sold by him on his terms. The practice of Brace was to take the goods from the freight office and store them in his room at his hotel. He loaded his wagon from this stock, and carried the articles about, stopping at houses and exhibiting them as the property of the corporation, often leaving bottles of medicine for trial. When he made collections, he sent the corporation its share, and when he extended credit he did it on behalf of the corporation. The action was on the bond, for a failure on the agent's part to pay for some goods not returned when the contract was discontinued.

The exact legal character of Brace's position under this contract is perhaps not of great importance. It has been designated "traveling agent" and is distinct from the drummer on the one hand and the peddler on the other. 15 A. & E. ENC. LAW (2d ed.) 292. Whether or not subject to a statute regulating peddling, he was virtually a peddler of his principal's goods, like the familiar sewing-machine agent.

The court held that the corporation was doing business within the state, and refused to permit a recovery on the bond. It followed the case of *Neyens* v. *Worthington,* 150 Mich. 580, which was impliedly approved by the federal district court n *Re Monongahela Distillery Co.,* 186 Fed. 220, and distinguished from that case and from the cases of *Butler Bros. Shoe Co.* v. *United States Rubber Co.,* 156 Fed. 1 (certiorari denied by Supreme Court, 212 U. S. 577), and *Atlas Engine Works* v. *Parkinson,* 161 Fed. 229. In these federal cases the representative of the foreign corporation was held to be a factor. In the *Butler* case the corporation suing was held not to be doing business in the state; the transaction was treated as a bailment for sale by a factor under a del credere commission, under which interstate commerce was to be carried on between the corporation and its factor. The contract in the *Atlas* case was given the same effect, and although the corporation was found to be doing business within the state, the contract was held to be protected from the state statute by the commerce clause.

The facts in the *Atlas* case were these: The Atlas Company was an Illinois corporation. By contract, the Plateville Company was made its agent to sell its machinery on commission in Wisconsin, to hold it on consignment, pay freights, store without charge, hold unsold machinery subject to the Atlas Company's orders, ship as directed, and guarantee payment for all machinery sold. Unsold goods, at the end of two years, were to be bought at cash, at principal's option. Machinery shipped to the Plateville Company, to be installed in the plant of X company, was sold to Y company. Upon the bankruptcy of the Plateville Company, defendant Parkinson was appointed trustee, and the Atlas Company claimed the amount paid into court by Y company for the machinery sold it. It had not complied with the statute. The court (per SANBORN, J.) admitted that the machinery had become mingled with the mass of property in the state, and intimated doubt whether the Atlas Company might have recovered from Y company on the basis of this contract. It was doing business in Wisconsin through its agent. But this contract, he held, not purporting to sell anything in the state, provided for carrying on commerce between the states, under the authority of the *Butler Bros.* case and *Caldwell* v. *North Carolina,* 187 U. S. 622. It was a kind of interstate bailment for sale, causing the importation of goods into the state.

Waiving the difference (if there is any) between suing on the bond and suing on the principal contract (none was recognized in the principal case and in *Gunn v. White, etc., Co.,* 57 Ark. 24, 20 S. W. 591. 18 L. R. A. 206), certain features might afford a basis for distinction between the Michigan cases and the federal decisions referred to. In the former, the agents were to give their entire time to the foreign corporation; credit was extended to purchasers on behalf of the corporation. In the latter, the factors guaranteed payment to the corporation, and sold to their own customers. In the former, the transportation of the goods into the state was a necessary prerequisite to carrying on the business provided for in the contract, but only an incident to the main business within the state in goods which had been commingled with the goods in the state. In the latter, the object and effect of the contract, primarily, was to promote commerce between persons in different states on a consignment account; the arrangement was all but a sale to the consignee. The Arkansas court, in the *Gunn* case, supra, said that the contract and bond between corporation and agent "were made a foundation of a future trade between a corporation of one state and a citizen of another, and were a direct method devised to increase the business of the former, and, as to them, served as a basis of interstate commerce." See also *McCall* v. *California,* 136 U. S. 104, where the agency had no other object than to promote interstate commerce. In the one case, the corporation goes through the agent and beyond him into the state, in its control of his dealings with the goods; all his acts and transactions with reference to them were legally the corporation's. In the other case, the corporation does not go beyond the agent; he is an independent dealer, with whom the corporation leaves its goods, not controlling his activities further than to retain ownership of the goods until sale, to require a certain method

of accounting, and to acquire ownership of the cash receipts or a claim against the agent for the price. The goods in possession of the agent at the termination of the contract were to be purchased *at the consignor's option.*

Perhaps, in the Michigan cases, the corporation itself invaded the state, through the instrumentality of a branch office or agency, merely *to a greater degree* than in the federal cases, where only the goods of the corporation were sent to the independent dealer in the state, left with him for sale and accounting. But as soon as it is admitted that the whole transaction bears such a character as to require the conclusion that the corporation is doing business within the state, then it would seem that the contract is governed by the state law. *Hastings Industrial Co.* v. *Moran,* 143 Mich. 679; *Haughton Elevator & Machine Co.* v. *Detroit Candy Co.,* 156 id. 25. So that while the *Butler* and *Monongahela* cases, if they correctly decided that the foreign corporation was not doing business in the state, may be distinguished from the *Lange* and *Neyens* cases in the Michigan court, the *Atlas* decision seems to be logically in conflict with them. If the transaction or arrangement is predominantly and primarily one of interstate commerce, the contract should stand; if it is primarily and substantially a carrying on of business within the state, the statute should be given effect. In this view, the *Atlas* case was wrongly decided, provided the court was correct in its view that the corporation was doing business in the state. See also *Cone* v. *Tuscaloosa Mfg. Co.,* 76 Fed. 891; *Commonwealth* v. *Parlin, &c. Co.,* 118 Ky. 168, 80 S. W. 791; *Thomas Mfg. Co.* v. *Knapp,* 101 Minn. 432. *Contra, Gunn* v. *White, &c. Co.,* supra.

Another view of the question may present a different basis for distinction. It is obvious that these contracts really have two aspects. The primary purpose, the whole plan and effect, is to introduce and sell the manufactures of the foreign corporation in the state, and this involves an interstate shipment in the same degree that a contract of sale directly between the corporation and the ultimate purchaser would. Such a contract is within the commerce clause because it involves necessarily the transportation of goods between states. *Cooper Mfg. Co.* v. *Ferguson,* 113 U. S. 727. It has been stated, very broadly, that "every negotiation, initiatory and intervening act, contract, trade, and dealing between citizens of any state, or territory, or the District of Columbia, with those of another political division of the United States, which contemplates and causes such importation, whether it be of goods, persons, or information, is a transaction of interstate commerce." *United States* v. *Tucker,* 188 Fed. 741; *United States* v. *Swift & Co.,* 122 Fed. 529; s. c., 196 U. S. 375. Contracts of the kind being considered do relate to interstate commerce, in the sense that they call for the importation of goods into the state (at least this contract does), and in some cases dealing with them in original packages. *Brown* v. *Maryland,* 12 Wheat. 419; *United States* v. *Swift & Co.,* supra. If this were all, clearly their enforcement could not be hindered by state laws, according to the principle governing the decision in *Lyng* v. *Michigan,* 135 U. S. 161.

But under this contract, the goods were not sold in the original packages; they were peddled from door to door in the form of single articles.

If a tax on peddlers of such goods is valid, by parity of reasoning a contract providing for peddling is equally within the cognizance of the state authority, and as to such an object the contract is declared to be illegal. It is conceivable that an action on the contract for failure to return goods shipped to the agent or to account for such might be secured to the corporation by the commerce clause, since this is a controversy between citizens of two states over goods shipped from one to the other for which the one is entitled to hold the other liable; a controversy over a transaction which the corporation, under the broad terms of the contract, may treat as a sale under such conditions. On the other hand, an action for the proceeds of a particular sale (as in the *Atlas* case), or an attempt by the corporation to recover the price from a purchaser on the authority of the contract, or an action for damages caused the corporation by the agent's refusal to go on with the contract upon insufficient notice, brings the corporation into the state as a person dealing at the distributing point, and ipso facto subjects it to the state law. Such would be the case also if a purchaser on credit should die, and the corporation should afterwards file a claim against the estate, setting up the contract as evidence of its title to the debt. As to these matters, the contract relates not at all to interstate commerce. They are separate and distinct from the importation. It may be observed that the commerce clause would not cover an order by a customer on a cigar merchant for a box of foreign brand cigars, if the merchant should be obliged to import a supply before he could fill the order. A corporation like the United Cigar Stores Company, if it manufactured cigars at a central point, might put an agent in charge of a store in Detroit, to sell the cigars shipped to him, according to instructions, and account for the proceeds, and be responsible for the cigars. The only difference from our case is that the contract of employment probably would say nothing about shipments or return of the unsold goods. But it would hardly be contended that a single clause concerning the interstate shipment of goods could liberate from the control of the state law the entire contract, which deals almost wholly with the business of the corporation carried on within the state. See *Hastings Industrial Co.* v. *Moran,* and *Haughton Co.* v. *Candy Co.,* supra.

These views, it will be noted, would require a different holding in both the *Atlas* case and the principal case. If it seems like hairsplitting, ample precedent for this may be cited in the discussions of this general problem by the courts. See the opinions in *Robbins* v. *Shelby County Taxing District,* 120 U. S. 489, and *Ficklen* v. *Shelby County,* 145 U. S. 1, for example. Lines must be drawn somewhere, and it may be as logical and practical and convenient to draw one through the imaginary center of a two-faced contract as between broken and unbroken parcels or between stationary and itinerant drummers. It is as much the object of public policy to secure to the states the right to regulate by law the purely local activities of foreign corporations within their borders, when they can be separated from their interstate activities, as to secure uniformity in the regulation of the latter.

There is still another consideration which seems to be pertinent. Whether it be the primary purpose or not, at least a very material and important

object of these contracts is the retail sale of the goods by the corporation through its agent, after they have become part of the general property in the state. But as to this phase of its general purpose and effect, it has been reasoned that such a contract is unenforceable by the corporation before compliance with the state law. This is equivalent to saying that, as to the corporation, the contract is pro tanto illegal. Being illegal in part, it is void in toto as to the corporation, and will not be enforced as to that part which in itself is not in contravention of any law. See *Diamond Glue Co.* v. *United States Glue Co.,* 187 U. S. 611; *McMullen* v. *Hoffman,* 174 U. S. 639. If the reasoning we have indulged in be correct, the state law was competent to render the contract, when sued on by the corporation, illegal and void in certain of its objects, under the conditions which were present. This quality attached to the entire contract, whether enforcement of it was sought for a valid purpose in the state or federal court. See *Monongahela* case, supra.

E. G. K.